Supreme Court, U.S.
FILED
001693 MAY - 8 2001
OFFICE OF THE CLERK

No. 00-

IN THE

Supreme Court of the United States

AMADO A. MIRANDA and ESPERANZA MIRANDA,

Petitioners,

v.

JOHN ASHCROFT, Attorney General of the United States of America,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

OLEN D. WOODS
Counsel of Record
JOSE C. ROJO
3745 Fourth Ave.
San Diego, California 92103
(619) 298-6522

Attorney for Petitioners

166940

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Congress has plenary powers to regulate immigration. The power of Congress to enact laws to regulate immigration are limited by the United States Constitution and the Articles of Amendment. It has been recognized, since this Court's decision in *Marbury v. Madison*, that when Congress transgresses the limits established by the Constitution and its amendments, the Judicial Branch has the duty and the authority to review the act of Congress and the execution of the statute.

The issue presented is whether a district court has jurisdiction to adjudicate the constitutional challenges to a federal statute when the statute retroactively subjects a legal permanent resident to deportation and the legal permanent resident has been deported pursuant to the challenged statute.

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioner Amado A. Miranda was a legal permanent resident in the United States for more than 30 years and up to the time when he was ordered deported on October 6, 1998.

Petitioner Esperanza Miranda is Amado Miranda's spouse and a citizen of the United States.

Respondent

Former Respondent Janet Reno was the Attorney General of the United States and was a party to the proceeding only in her official capacity. John Ashcroft has now been substituted as the new Attorney General of the United States.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Cited Authorities	iv
Table of Appendices	vi
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Writ	7
Conclusion	11

TABLE OF CITED AUTHORITIES

Page

Cases:

City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157 (1997) 8

INS v. Chadha, 462 U.S. 919 (1982) 8

M'Culloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 (1819) 8

Marbury v. Madison, 1 Cranch 137, 2 L. Ed. 60 (1803) ..... i, 8, 9, 10

Najjar v. Reno, 97 F. Supp. 2d 1329 (S.D. Fla. 2000) 11

St. Cyr v. INS, 229 F.3d 406 (2d Cir. 2000) 11

Tefel v. Reno, 180 F.3d 1286 (11th Cir. 1999) 11

Webster v. Doe, 486 U.S. 592, 108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988) 7, 8

United States Constitution:

First Amendment 6

Cited Authorities

Page

Statutes:

8 U.S.C. § 1252 ..... 1, 7

28 U.S.C. § 1254(1) 1

California Penal Code § 288 ..... 4, 5

Other Authorities:

Immigration and Naturalization Act as amended in 1996, section 237 1

Immigration and Naturalization Act as amended in 1996, section 237(a)(2)(A)(iii) 5

Immigration and Naturalization Act as amended in 1996, section 238(b) 5

Immigration and Naturalization Act as amended in 1996, section 241 ..... 1, 5, 6

Immigration and Naturalization Act as amended in 1996, section 241(a)(2)(A)(iii) 5

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed February 7, 2001 ..... 1a

Appendix B — Order Of The United States District Court For The Southern District Of California Granting Defendant's Motion To Dismiss And Terminating Case For Lack Of Subject Matter Jurisdiction Dated And Filed July 23, 1999 .... 8a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The district court's decision granting respondent's motion to dismiss and terminating the case for lack of jurisdiction (Appendix B at 8a-13a) is not a published decision. The Court of Appeals opinion per Judge Richard C. Tallman affirming the district court's ruling (Appendix A at 1a-7a) is a published opinion. The opinion is published at 238 F.3d 1156 (9th Cir. 2001).

STATEMENT OF JURISDICTION

The Court of Appeals entered its opinion affirming the district court on February 7, 2001.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions challenged by Petitioner on the merits of his claims are sections 237 and 241 of the Immigration and Naturalization Act as amended in 1996. The statute challenged pertaining to subject matter jurisdiction is 8 U.S.C. § 1252.

STATEMENT OF THE CASE

Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) in 1996. The IIRIRA amended the definition of aggravated felony on September 30, 1996. Petitioner Amado Miranda (hereinafter Amado) was admitted to lawful permanent residency in 1970. Amado committed a criminal offense on May 5, 1983. The offense was not an aggravated felony and did not subject Amado to deportation when Amado was convicted. The definition of aggravated felony, as amended by the IIRIRA, subjected Amado to deportation without the right to request relief. On October 6, 1998, Amado was arrested by Immigration and Naturalization Service (hereinafter INS) agents for no other reason except he was now subject to deportation under the 1996 IIRIRA. On October 19, 1998, Amado was ordered deported from the United States. Amado waived his appeal rights as to the Board of Immigration Appeals Board. Amado contends his Constitutional rights to substantive and procedural due process were violated by the enactment and enforcement of the IIRIRA provisions which caused his removal from the United States. Amado contends the application of the IIRIRA to his case violates the ex-post facto clause of the Constitution. Petitioner Esperanza Miranda (hereinafter Esperanza) contends that the unconstitutional enactment and enforcement of the IIRIRA deprives her of her First Amendment right to privacy and association by preventing her from living with her husband.

On November 18, 1998, Amado filed a civil action in the United States District Court to raise his Constitutional claims. The district court dismissed the claim without prejudice on December 16, 1998. Amado and Esperanza filed their first amended complaint on February 25, 1999.

Amado and Esperanza filed a motion for a preliminary injunction on April 13, 1999. Respondents filed a cross motion to dismiss the complaint based on lack of habeas corpus jurisdiction, res judicata, lack of standing, and lack of personal jurisdiction over the Respondents. The motions were continued once by stipulation. The district court issued an order dismissing the case for lack of subject matter jurisdiction on July 23, 1999. Petitioners filed their notice of appeal on August 17, 1999.

Petitioners' case was argued and submitted on October 12, 2000, before a panel for the Ninth Circuit Court of Appeals. The Court of Appeals filed its decision on February 7, 2001, affirming the dismissal by the district court for lack of subject matter jurisdiction.

Petitioners request the Court reach the merits of their claims and reverse the holding of the Court of Appeals and grant the appropriate relief to their Constitutional claims. In the alternative, Petitioners request the decision of the Court of Appeals be reversed and the case remanded for full adjudication on the merits.

1. The Petitioners' particular circumstances are illustrative of the effect of the challenged enactment. Since October 19, 1998, Petitioners Amado and Esperanza Miranda have been forced to live separately by the Respondents in this action. Amado is being forced to stay out of the United States and will be forced to remain in Mexico unless this Court redresses the illegal actions taken by the Respondents. Amado is now living in Mexico, sub-employed due to his age, and under poverty levels.

Esperanza is a United States citizen with her residence and place of employment in San Diego, California. Esperanza cares for one of their children. Amado Miranda was a legal permanent resident alien lawfully admitted into the United States for almost 30 years. Amado and Esperanza have been lawfully married for over thirty (30) years and have always been together.

The Separation caused by Respondents' removal of Amado from the United States has caused and continues to cause extreme suffering. Esperanza and Amado suffer because they are no longer living together and can only see one another twice a month and because of the onerous economic burden Esperanza carries to support the household. Petitioners' circumstances are not unique. A large number of former legal permanent residents have been deported as a result of the challenged statute and a large number are subject to deportation because of the statute.

2. Amado's predicament arises from an offense committed more than 16 years ago. On or about May 5, 1983, Amado suffered a state conviction in San Diego, California, case No. CRS 61993, for violation of California Penal Code § 288. Mr. Miranda plead guilty and was sentenced to 90 days in work furlough and supervised release. Amado was informed by counsel and the court, prior to the plea agreement, that the conviction would not affect his immigration status. Amado's good conduct and compliance with probation after conviction earned him to be released from supervised probation on October 23, 1984.

Amado made every attempt and succeeded in vindicating himself with his family, his peers, and his community. Amado genuinely showed remorse and regret for the acts he did while

in acute depression which lead to the conviction. Amado learned from his experience, moved on with his life, and has been gainfully employed during the entire period after his conviction while taking care of his family.

After more than 15 years from his conviction, Amado was arrested in his home by the INS and he was held, in custody, without right to bail. On October 6, 1998, the INS also served Amado with a notice to appear. On October 19, 1998, Amado was subjected to expedited removal proceedings pursuant to an allegation Amado was an aggravated felon and he was summarily ordered removed from the United States.

The notice to appear charged Amado with being removable under section 237(a)(2)(A)(iii) of the Immigration and Naturalization Act (INA) as amended by the IIRAIRA. Section 237(a)(2)(A)(iii) provides that an alien convicted of an aggravated felony is removable. An alien subject to removal as an aggravated felon is to be provided administrative procedures as described in section 238(b) of the INA.

Section 241(a)(2)(A)(iii) defines aggravated felonies. Section 241 was amended on September 30, 1996, to include sexual abuse of a minor in the list of aggravated felonies. Section 241 amendment was enacted 13 years after Amado's conviction. Respondents deemed Amado's conviction under California Penal Code § 288 was an offense described under section 241 of the INA. Amado's 1983 conviction was not grounds for deportation prior to the 1996 amendment because sexual abuse of a child was not included in the definition of aggravated felonies. After the amendment and after 15 years

from the time of his conviction, section 241 was applied to Amado and he was deported under the new provisions of the INA.

Due to the expediency of the proceedings and because Amado was in custody without the right to bail, he did not obtain counsel himself but someone else chose one for him. His counsel conceded deportability and waived Amado's right to appeal to the BIA. After Amado was deported, his family obtained present counsel to prosecute a claim for the Constitutional violations Amado and Esperanza suffered. Amado and Esperanza filed a claim in the United States District Court to have a court of law redress the Respondents' unconstitutional acts.

3. Amado and Esperanza Miranda have been left with no recourse to judicial review. Their claims are colorable Constitutional claims and they sought redress in the United States District Court, a court of original jurisdiction for Constitutional questions. The immigration judge nor the Board of Immigration appeals had the capacity to adjudicate Petitioners' claims, for an agency lacks jurisdiction to rule on the constitutionality of the statute it is charged to administer. Petitioners' claims challenge the Constitutionality of an act of Congress and its enforcement.

Petitioners' Constitutional claims were violations of Amado's substantive and procedural Due Process rights; violation against the ex-post facto clause prohibition and against Bills of Attainder; and for violation of Esperanza's First Amendment freedom of association rights. The lower court declined to reach the merits of the Constitutional claims asserting it lacked jurisdiction. (Appendix B at 13a). Petitioners submitted and argued on appeal that either the

Appeals' Court or the district court have jurisdiction to adjudicate Petitioners' claims, for Congress cannot foreclose judicial review of Constitutional claims. The Court of Appeals, however, affirmed the district court's decision and upheld the dismissal for lack of subject matter jurisdiction. (Appendix A at 7a). A record had to be developed in the lower court in order to have a meaningful review of Petitioners' claims in the court of appeals, therefore, Petitioners decided to file in the district court. Petitioners also submitted that under the mandate of the equal protection clause, Amado is entitled to habeas corpus relief. This Court has jurisdiction, however, to address and resolve Petitioners' Constitutional claims in the event it is determined that the district court lacked jurisdiction.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' decision is in direct conflict with case law from this Court and is in conflict with other Circuits. The decision from the Court of Appeals affects a great number of legal permanent residents, and other members of the public, who may otherwise resort to a court of law to raise their complaints for unlawful Governmental action. Constitutional challenges to an act of Congress can only be reviewed by the Judicial Branch and Petitioners' claims must be heard in a forum of competent jurisdiction, a court of law.

Even though 8 U.S.C. § 1252 attempts to preclude judicial review of Constitutional claims, this Court has stated that a serious Constitutional question would arise if a federal statute were construed to deny any judicial forum for a colorable Constitutional claim. *Webster v. Doe*, 486 U.S. 592,

108 S. Ct. 2047, 100 L. Ed. 2d 632 (1988). Petitioners submit their claims are colorable and deserving of review by this Court, the Court of Appeals or the district court.

This Court has long recognized that under our Constitution, the Federal Government is one of enumerated powers. *M'Culloch v. Maryland*, 4 Wheat. 316, 405, 4 L. Ed. 579 (1819). "Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, . . . , so long as the exercise of that authority does not offend other Constitutional restriction." *INS v. Chadha*, 462 U.S. 919, 941 (1982).

This Court has also long held that the judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. *Marbury v. Madison*, 1 Cranch 137, 176, 2 L. Ed. 60 (1803); *see also City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997). Also this Court has held that while Congress is given the power to enforce, it is not given "the power to determine what constitutes a constitutional violation." *Id.* at 519.

In *Marbury* the Court emphasized that a person who has a right, and that right has been violated, the laws of his country ought to afford him a remedy. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury*, 1 Cranch at 162-63. And when an officer of the United States is who inflicts the injury, a remedy is available. It cannot be contended that heads of the

departments are not amenable to the laws of their country; no act of Congress confers so extraordinary a privilege. *Id.* at 164-65.

The acts of an officer acting on behalf of the Government are subject to judicial review.

> When the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

Id. at 166. And, "the individual who considers himself injured has a right to resort to the laws of his country for a remedy." *Id.* at 166.

The fact that Amado was injured by the acts of Congress and the enforcement by Respondent in its official capacity is undisputed. Therefore, contrary to the decision of the Court of Appeals, the courts of the United States have jurisdiction to hear Petitioners' claims. This is true because:

> The constitution vests the whole judicial power of the United States in one supreme court, *and such inferior courts* as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in

> some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

Id at 173-74. The district courts are part of the judicial power and "[i]t is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." *Id.* at 177.

The district court has jurisdiction to hear Petitioners' claims because "[t]he judicial power of the United States ***is extended to all cases arising under the constitution***." *Id.* at 178. (Emphasis added). The Court in *Marbury* illustrated this grant of power and authority by citing the provisions of the Constitution Petitioner now asserts provide relief to him. The Court stated "[t]he constitution declares that 'no bill of attainder or ex post facto law shall be passed.' If, however, such a bill should be passed and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavours to preserve?" *Id.* at 179. "From these and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of ***courts***, as well as of the legislature." *Id.* at 179-80. (Emphasis in original). Petitioners' Constitutional claims included ex-post facto and bill of attainder claims. Neither the district court nor the Court of Appeals reached the case on its merits and declined to exercise jurisdiction, a power and duty extended by the Constitution itself. Such holding is in direct conflict with *Marbury v. Madison* and its progeny. No explication exists for such departure from the existing precedent.

The decision by the Court of Appeals also conflicts with other Circuits. Other courts have reviewed Constitutional claims and reached the merits of the claims. *See Najjar v. Reno*, 97 F. Supp.2d 1329 (S.D. Fla. 2000). *Tefel v. Reno*, 180 F.3d 1286 (11th Cir. 1999). And other Circuits have ruled the same claims of impermissible retroactive application of IIRIRA have merit and have granted relief. *See St. Cyr v. INS*, 229 F.3d 406 (2d Cir. 2000).

The decision of this Court will resolve the conflict among the Circuits and the Conflict with well established Constitutional Law principles developed by this Court. The decision will provide a consistent rule of law that will make clear that the district courts are courts of original jurisdiction to hear Constitutional claims and challenges to acts of Congress including immigration related enactments.

CONCLUSION

For the reasons stated above, the petition for writ of certiorari should be granted.

Respectfully submitted,

OLEN D. WOODS
Counsel of Record
JOSE C. ROJO
3745 Fourth Ave.
San Diego, California 92103
(619) 298-6522

Attorney for Petitioners

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED FEBRUARY 7, 2001

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-56359
D.C. No. CV-98-02111-TJW

AMADO MIRANDA, an individual;
ESPERANZA MIRANDA, an individual,

Plaintiffs-Appellants,

v.

JANET RENO, Attorney General of the United States of America; DOES 1-100,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of California
Thomas J. Whelan, District Judge, Presiding

Argued and Submitted
October 12, 2000 — Pasadena, California

Filed February 7, 2001

Appendix A

Before: Robert Boochever, A. Wallace Tashima, and Richard C. Tallman, Circuit Judges.

Opinion by Judge Tallman

* * *

OPINION

TALLMAN, Circuit Judge:

Amado Miranda sought judicial review by the district court of a final order of removal, invoking 28 U.S.C. § 2241 (habeas corpus) and 28 U.S.C. § 1331 (federal question) as alternative grounds for jurisdiction. The district court dismissed Miranda's case for lack of jurisdiction, finding that recent changes in immigration law precluded judicial review of his claims. We must determine whether the district court retains jurisdiction to review Miranda's claims under either § 2241 or § 1331. We hold it does not.

I

Miranda was admitted to the United States as a legal permanent resident in 1970. He lived in the United States with his wife, a United States citizen, until he was removed in 1998.

In 1983, Miranda was charged in California state court with committing a lewd act upon a minor, a felony violation of California Penal Code § 288. He alleges that he pled guilty after both the prosecutor and the court assured him that

conviction on the charge would not adversely affect his immigration status.[1] He served a short sentence in a county jail.

In 1996, Congress passed an amendment to the Immigration and Nationality Act entitled the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). *See* Pub. L. No. 104-208, 110 Stat. 3009 (1996). IIRIRA amended the definition of "aggravated felony" to include "sexual abuse of a minor." 8 U.S.C. § 1101(a)(43)(A) (2000). Congress provided that the new definition applied retroactively to crimes committed before IIRIRA was enacted. *Id.* Accordingly, the crime to which Miranda pled guilty in 1983 became an aggravated felony and, thirteen years after he pled guilty, Miranda became subject to expedited removal. *See* 8 U.S.C. §§ 1101(a)(43)(A), 1227(a)(2)(A)(iii) (2000).

On October 6, 1998, INS agents arrested Miranda at his home on the grounds that he was an aggravated felon subject to removal under IIRIRA. Miranda requested a hearing to determine whether or not he could remain in the United States.

At the hearing, the immigration judge found that Miranda was a removable alien by virtue of his 1983 guilty plea and ordered him removed from the United States. Miranda's counsel waived his right to appeal the order to the Board of Immigration Appeals. That day, the INS removed Miranda to Mexico.

---

1. For the purpose of reviewing the district court's dismissal of Miranda's claims for lack of subject matter jurisdiction, we must presume that each of his allegations is true. *See United States v. One 1997 Mercedes, E420*, 175 F.3d 1129, 1130 n.1 (9th Cir. 1999).

Appendix A

Miranda hired new counsel following his removal and sought review in federal district court, invoking federal question and habeas corpus jurisdiction. He claimed that he was deprived of due process and that, as applied to him, IIRIRA had an unconstitutional retroactive effect. Specifically, the INS applied IIRIRA thirteen years later to remove him for a guilty plea that Miranda alleges he made in reliance on assurances by the prosecutor and the court that he could not be deported as a result.

IIRIRA streamlined removal procedures in part by precluding judicial review of final removal orders for legal aliens who have committed aggravated felonies. Specifically, IIRIRA repealed the provision pursuant to which most deportation orders (the pre-IIRIRA analog of removal orders) were subject to direct review by federal appellate courts, *see* 8 U.S.C. § 1105(a) (repealed 1996), and purported to deprive federal courts of "jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" an aggravated felony. 8 U.S.C. § 1252(a)(2)(C) (2000). The district court dismissed Miranda's action. The district court held that it lacked subject matter jurisdiction over Miranda's claims for three reasons: (1) the Act eliminated habeas corpus jurisdiction for resident aliens challenging final orders of removal; (2) Miranda could not invoke habeas corpus jurisdiction because he was no longer "in custody;" and (3) the court lacked authority to review the order since it had already been executed.

Appendix A

II

We review de novo a district court order dismissing an action for lack of subject matter jurisdiction. *Milne v. Hillblom*, 165 F.3d 733, 735 (9th Cir. 1999).

A

The district court did not have the benefit of our recent decision in *Flores-Miramontes v. INS*, 212 F.3d 1133 (9th Cir. 2000), in which we held that IIRIRA did not eliminate habeas corpus jurisdiction over removal orders. We disagree with the district court's conclusion that habeas corpus is, as a general matter, unavailable under IIRIRA. Under IIRIRA, an immigrant still in United States custody may seek habeas corpus review of a final order of removal.

B

But Miranda cannot avail himself of habeas corpus jurisdiction because he has already been removed and therefore is no longer "in custody." *See* 28 U.S.C. § 2241; *see also Williamson v. Gregoire*, 151 F.3d 1180, 1182 (9th Cir. 1998) ("[T]he 'in custody' requirement is jurisdictional."). Habeas corpus jurisdiction "has been extended beyond that which the most literal reading of the statute might require," *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502, 510 (1982), to individuals who, though not subject to "immediate physical imprisonment," are subject to "restraints not shared by the public generally" that "significantly confine and restrain [their] freedom." *Jones v. Cunningham*, 371 U.S. 236, 240, 243 (1963). Thus, federal

courts have exercised habeas corpus jurisdiction over a state prisoner released on parole, *id.*, a convict released on his own recognizance pending execution of his sentence, *Hensley v. Municipal Court*, 411 U.S. 345, 351 (1973), an individual sentenced to attend an alcohol rehabilitation program for fourteen hours, *Dow v. Circuit Court of the First Circuit*, 995 F.2d 922, 923 (9th Cir. 1993), and an individual who, though not in physical custody, was subject to a final order of deportation. *Williams v. INS*, 795 F.2d 738, 744-45 (9th Cir. 1986). Recently, we held that under extreme circumstances — when the INS removed an immigrant "in violation of the immigration judge's order and after interference with his right to counsel" — the district court had habeas corpus jurisdiction over an immigrant who had already been removed. *Singh v. Waters*, 87 F.3d 346, 349 (9th Cir. 1996).

Such extreme circumstances do not exist here. Miranda was removed pursuant to an immigration judge's order after a hearing at which he was represented by counsel. His counsel waived Miranda's right to appeal that order to the Board of Immigration Appeals. Miranda is also not subject to restraints not shared by the public generally that significantly confine and restrain his freedom. Miranda is subject to no greater restraint than any other non-citizen living outside American borders. He cannot, however, return to the United States because he has been convicted of an aggravated felony.

No interpretation of § 2241 that is not utterly at war with its plain language permits us to exercise habeas corpus jurisdiction over Miranda's claims. Immigrants who have already been removed, such as Miranda, do not satisfy the "in custody" requirement of habeas corpus jurisdiction.

We affirm the district court's holding that it lacked habeas corpus jurisdiction to hear Miranda's claims because he was no longer in custody.

C

Miranda argues in the alternative that the district court must exercise federal question jurisdiction over his constitutional claims under the general federal question statute. *See* 28 U.S.C. § 1331. In IIRIRA, however, Congress expressly stripped the federal courts of jurisdiction to review final orders of removal such as Miranda's. *See* 8 U.S.C. § 1252(a)(2)(C). We affirm the district court's holding that it lacked federal question jurisdiction to hear Miranda's claims under § 1331.

III

The district court properly dismissed Miranda's case for lack of jurisdiction.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA GRANTING DEFENDANT'S MOTION TO DISMISS AND TERMINATING CASE FOR LACK OF SUBJECT MATTER JURISDICTION DATED AND FILED JULY 23, 1999

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO: 98-CV-2111 TW (LSP)

AMADO ALVAREZ MIRANDA,

Plaintiff,

vs.

JANET RENO, Attorney General of the United States of America et al.,

Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS; TERMINATING CASE FOR LACK OF SUBJECT MATTER JURISDICTION

I. *Introduction*

Before the court is a motion for a preliminary injunction filed by plaintiff Amado Alvarez-Miranda and a motion to dismiss filed by defendant Janet Reno. All sides are represented by counsel. For the reasons expressed below, plaintiff's motion for a preliminary injunction is **DENIED** and defendant's motion to dismiss is **GRANTED**.

Appendix B

II. *Background*

Plaintiff is a native and citizen of Mexico who immigrated to the United States in February 17, 1970. On February 11, 1983 plaintiff was convicted of committing a lewd act upon a child.[1]

On October 6, 1998 the Immigration and Naturalization Service (INS) apprehended Miranda and placed him in removal proceedings, charging him with removability under Immigration and Naturalization Act ("INA") Section 237(a)(2)(A)(iii) [8 U.S.C. § 1227(a)(2)(A)(iii)] as an alien convicted of an aggravated felony. Approximately one week later, Miranda and his attorney appeared before an immigration judge, conceded that Miranda was subject to removal and not eligible for any relief. Accordingly, the immigration judge ordered Miranda removed from the United States to Mexico. Miranda waived his right to appeal to the Board of Immigration Appeals (BIA) and was removed from the United States to Mexico later that day.

One month later, Miranda commenced this action by filing a "Petition for Writ of Mandate and for Declaratory Relief" with this court. On December 2, 1998 plaintiff served the United States Attorney with a blank summons and petition. By order dated December 16, 1998, this court dismissed plaintiff's case without prejudice because (1) mandamus relief had been abolished in district courts, and (2) the complaint failed to properly allege a basis of federal jurisdiction. The order granted plaintiff leave to file a first amended complaint.

---

1. See Cal. Penal Code § 288(a) (West 1999).

Appendix B

On February 25, 1999 plaintiff filed a "First Amended Complaint for Declaratory Relief; For a Permanent Injunction; or Alternatively for a Writ of Habeas Corpus." In broad brush, plaintiff seeks a judicial order restoring his legal permanent resident status and declaring the October 1998 removal order void.

On April 14, 1999 plaintiff moved for a preliminary injunction, asserting that his removal from the United States violated various provisions of the United States Constitution. Two weeks later, defendant moved to dismiss the complaint. The parties filed opposition memoranda on June 14, 1999 and replies on June 21, 1999. The court took both motions under submission and issues this order without oral argument pursuant to Civil Local Rule 7.1.d.1.

III. *Discussion*

It is well-established that a federal court cannot reach the merits of any dispute until it confirms that it has subject matter jurisdiction to adjudicate the issues in the case. *Steel Co. v. Citizens for a Better Environ.*, 523 U.S. 83, __, 118 S.Ct. 1003, 1013, 140 L.Ed.2d 210 (1998). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Id.* (quoting *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L.Ed. 264 (1868)). Accordingly, federal courts are under a continuing duty to confirm their jurisdictional power and are "obliged to inquire sua sponte whenever a doubt arises as to [its] existence . . ." *Mt. Healthy City Sch. Dist. Bd. of*

Educ. v. Doyle, 429 U.S. 274, 278, 97 S.Ct. 568, 571, 50 L.Ed.2d 471 (1977) (citations omitted).

The INS commenced removal proceedings against Miranda on October 6, 1998 and an order of removal became final on October 16, 1998. Accordingly, judicial review is governed by the permanent jurisdictional provisions of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-132, 110 Stat. 3009-546 ("IIRIRA"); IIRIRA §§ 309(c)(1) & (a).

For several reasons, the court finds that it lacks jurisdiction over this petition. First, this court has previously held that IIRIRA eliminated § 2241 habeas corpus jurisdiction for resident aliens challenging final orders of removal. *See Maldonado v. Fasano*, No. 98-CV-800 TW, 1999 WL 343423, at *4-5 (S.D. Cal. May 21, 1999). The court found that several provisions of IIRIRA eliminated habeas jurisdiction, including INA § 242(a)(1), (b)(2), and (b)(9). The court held that "[t]o the extent judicial review is available under the immigration statutes, or is compelled by the constitution, such review exists only in the court of appeals." *Id.* at *5. The court also relied on INA § 242(a)(2)(C), which precludes judicial relief for aggravated felons subject to final orders of removal. *Id.* at *6.[2] The court stands by its recent

2. The Ninth Circuit recently confirmed that the constitution compels some limited direct judicial review for colorable constitutional issues, notwithstanding the provisions of INA § 242(a)(2)(C). *See Chavez-Murilla v. INS*, __ F.3d __, 1999 WL 415348, at *2 (9th Cir. Jun. 22, 1999). Thus, to the extent constitutional review of plaintiff's removal is available at all, it exists only before the Ninth Circuit Court of Appeals.

decision in *Maldonado* and holds that it lacks jurisdiction to hear a challenge to the statutory or constitutional validity of a final order of removal. In addition, employing similar reasoning and a related IIRIRA provision (INA § 242(g)), the Fourth Circuit recently held that IIRIRA deprives district courts of authority under § 2241 to challenge the execution of a final order of removal or deportation. *Mapoy v. Carroll*, __ F.3d __, 1999 WL 496204, at *5 (4th Cir. Jul. 13, 1999). Thus, the court lacks jurisdiction to entertain petitioner's challenge to his executed and final order of removal.

Second, as a jurisdictional prerequisite to federal habeas relief, an alien must be "in custody" within the meaning of § 2241. Generally, a lawful permanent resident who is subject to a final order of removal but not yet removed from the United States satisfies the "in custody" requirement of § 2241. *Nakaranurack v. United States*, 68 F.3d 290, 293 (9th Cir. 1995). However, in this case plaintiff did not commence the instant action until approximately four weeks *after* he was removed from the United States. Since Miranda is no longer subject to a final order of removal, is not in the physical custody of the federal or state governments, and is not even within the territorial borders of the United States, he does not satisfy the jurisdictional prerequisites of § 2241. Thus, this court lacked jurisdiction over Miranda's petition from the moment it was filed.[3]

Finally, during his October 1998 removal proceedings Miranda conceded that he was immediately removable from

---

3. In addition, since petitioner has already been removed from the United States, his habeas petition is moot. *See Hose v. ENS*, __ F.3d __, 1999 WL 374070, at *3 (9th Cir. Jun. 10, 1999).

the United States, waived any grounds for relief from removal, and waived his right to appeal to the BIA-actions which facilitated his immediate removal from the United States. He now seeks to unwind these actions through an untimely petition for writ of habeas corpus over which this court has no jurisdiction. Miranda has cited no case law, nor has this court located any, that would authorize a district court to nullify a final order of removal after it has been fully executed. While sympathetic to plaintiff's plight, the court regrets that he did not contest his removal from the United States at a time when this court may have had some authority to entertain such a challenge.

IV. *Conclusion*

For the reasons expressed above, the court **GRANTS** defendant's motion to dismiss and **DENIES** all other motions as moot. Plaintiff's complaint is hereby **DISMISSED** for lack of subject matter jurisdiction.

IT IS SO ORDERED.

DATE: July 23, 1999

s/ Thomas J. Whelan
Judge THOMAS J. WHELAN
United States District Court
Southern District of California

Supreme Court, U.S.
FILED
OCT 10 2001
OFFICE OF THE CLERK

(2)

No. 00-1693

In the Supreme Court of the United States

AMADO A. MIRANDA AND ESPERANZA MIRANDA,
PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

14 pp

QUESTION PRESENTED

Whether the district court lacked jurisdiction over petitioner Amado Miranda's constitutional challenge to his final removal order because he had already been removed from the United States and therefore did not satisfy the provision of the general federal habeas corpus statute, 28 U.S.C. 2241, that habeas corpus relief may be granted only to a habeas petitioner who is "in custody."

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Brownell v. *Tom We Shung*, 352 U.S. 180 (1956)	7
Calcano-Martinez v. *INS*, 121 S. Ct. 2268 (2001)	8
Carafas v. *LaVallee*, 391 U.S. 234 (1968)	6, 10
INS v. *St. Cyr*, 121 S. Ct. 2271 (2001)	8, 10
Johnson v. *Eisentrager*, 339 U.S. 763 (1950)	6
Jones v. *Cunningham*, 371 U.S. 236 (1963)	6
Maleng v. *Cook*, 490 U.S. 488 (1989)	6
Preiser v. *Rodriguez*, 411 U.S. 475 (1973)	9

Statutes:

Illegal Immigration Reform and Immigrant Responsibility Act, of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546, *et seq.*	2
§ 306(b), 110 Stat. 3009-612	9
§ 321(a)(1), 110 Stat. 3009-627	2
§ 321(b), 110 Stat. 3009-628	2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*	2
8 U.S.C. 1101(a)(43)(A) (Supp. V 1999)	2
8 U.S.C. 1105a(c) (1994)	9
8 U.S.C. 1182(a)(9)(A)(ii) (Supp. V 1999)	7
8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999)	3
8 U.S.C. 1229b(a)(3) (Supp. V 1999)	3
8 U.S.C. 1252(a) (Supp. V 1999)	8, 9

Statutes—Continued: Page

8 U.S.C. 1252(a)(1) (Supp. V 1999) 10
8 U.S.C. 1252(a)(2)(C) (Supp. V 1999) 5, 8
8 U.S.C. 1252(b)(1) (Supp. V 1999) 9, 10
8 U.S.C. 1252(d)(1) (Supp. V 1999) 8
28 U.S.C. 1331 ..... 5, 6, 9
28 U.S.C. 2241(c) 4

In the Supreme Court of the United States

No. 00-1693

AMADO A. MIRANDA AND ESPERANZA MIRANDA,
PETITIONERS

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 238 F.3d 1156. The decision of the district court (Pet. App. 8a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2001. The petition for a writ of certiorari was filed on May 8, 2001.[1] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] While the certiorari petition was pending in this Court, and after the time for filing a petition for rehearing en banc in the court of appeals had expired, the court of appeals *sua sponte* requested the parties to address whether rehearing en banc should be

STATEMENT

1. Petitioner Amado Miranda is a native and citizen of Mexico who entered the United States as a lawful permanent resident (LPR) in 1970.[2] Pet. App. 9a; C.A. App. 74. In 1983, petitioner was convicted in California state court, upon a guilty plea, to committing a lewd act upon a child. He received a suspended sentence of 120 days in jail for that offense. Pet. App. 9a; C.A. App. 75.

On September 30, 1996, Congress enacted into law the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546 *et seq.* In IIRIRA, Congress expanded the definition of the term "aggravated felony" in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to include "sexual abuse of a minor." See IIRIRA § 321(a)(1), 110 Stat. 3009-627; 8 U.S.C. 1101(a)(43)(A) (Supp. V 1999). Congress further provided that the expanded definition of "aggravated felony" would apply to all convictions falling within its terms, regardless of whether the conviction was entered before, on, or after the date of IIRIRA's enactment. See IIRIRA § 321(b), 110 Stat. 3009-628. Accordingly, by operation of IIRIRA, petitioner's state-court conviction became a conviction for an aggravated felony. Under the INA, an alien who is convicted of an aggravated felony at any time after his

---

granted. After the parties made submissions to the court of appeals on that question, the court of appeals denied rehearing and rehearing en banc on August 27, 2001.

[2] Esperanza Miranda, a United States citizen who is the wife of Amado Miranda, is also named as a petitioner in the certiorari petition and was a party to some of the proceedings below. Esperanza Miranda's claims, however, appear to be merely derivative of those of Amado Miranda. We therefore refer to Amado Miranda as "petitioner" in this brief.

admission to the United States is deportable, 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999), and is ineligible for discretionary cancellation of removal, 8 U.S.C. 1229b(a)(3) (Supp. V 1999).

On October 1, 1998, the Immigration and Naturalization Service (INS) issued a Notice to Appear (NOA), charging petitioner with being removable from the United States as an alien convicted of an aggravated felony. Pet. App. 9a; C.A. App. 78. On October 19, 1998, at a hearing before an immigration judge (IJ), petitioner, represented by counsel, conceded that he was removable and did not apply for relief from removal. Pet. App. 3a, 9a; C.A. App. 24. The IJ sustained the charge of removability in the NOA and ordered petitioner removed to Mexico. Petitioner waived his right to appeal to the Board of Immigration Appeals (BIA) and was removed to Mexico on the same day. C.A. App. 24.

2. On February 25, 1999, petitioner, through new counsel, filed a complaint in the United States District Court for the Southern District of California, challenging his removal order on the asserted ground that IIRIRA's expansion of the definition of "aggravated felony" was unconstitutionally retroactive as applied to his case. See Pet. App. 10a; C.A. App. 13-22, 33-46. The government moved for dismissal, arguing, among other things, that the district court had no authority to issue the writ of habeas corpus in petitioner's case because, after the execution of petitioner's removal order, petitioner was not "in custody" within the meaning of the

federal habeas corpus statute, 28 U.S.C. 2241(c).[3] C.A. App. 65-73, 93-95.

The district court dismissed the case for lack of jurisdiction. Pet. App. 8a-13a. As pertinent here, the court ruled that petitioner was not "in custody" because he did not file his petition for a writ of habeas corpus until after he had been removed from the United States, and so the court "lacked jurisdiction over [his] petition from the moment it was filed." *Id.* at 12a.

3. The court of appeals affirmed the dismissal of the petition for lack of jurisdiction. Pet. App. 1a-7a. The court held that petitioner "cannot avail himself of habeas corpus jurisdiction because he has already been removed and therefore is no longer 'in custody.'" *Id.* at

---

[3] Section 2241(c) provides:

> The writ of habeas corpus shall not extend to a prisoner unless—
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or
>
> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
>
> (5) It is necessary to bring him into court to testify or for trial.

5a. The court observed that the custody requirement of habeas corpus jurisdiction has been extended to reach "individuals who, though not subject to immediate physical imprisonment, are subject to restraints not shared by the public generally that significantly confine and restrain their freedom." *Ibid.* (internal quotation marks and brackets omitted). Nonetheless, it stressed, the custody element has not been construed to reach an individual, such as petitioner, who is "*not* subject to restraints not shared by the public generally that significantly confine and restrain his freedom." *Id.* at 6a (emphasis added). Petitioner, the court noted, "is subject to no greater restraint than any other non-citizen living outside American borders." *Ibid.* Accordingly, "[n]o interpretation of § 2241 that is not utterly at war with its plain language permits [the court] to exercise habeas corpus over [petitioner's] claims." *Ibid.*

The court also concluded that the district court could not exercise jurisdiction over petitioner's claims under the general federal question statute, 28 U.S.C. 1331. As the court stated the matter, "[i]n IIRIRA, * * * Congress expressly stripped the federal courts of jurisdiction to review final orders of removal such as [petitioner's]." Pet. App. 7a (citing 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999)).

ARGUMENT

The court of appeals correctly concluded that the district court lacked habeas corpus jurisdiction over petitioner's challenge to his removal order because petitioner is not "in custody" within the meaning of the habeas corpus statute. That decision does not conflict with any decision of this Court or any other court of appeals. The court of appeals also correctly ruled that the district court lacked jurisdiction over that challenge

under 28 U.S.C. 1331. Further review is therefore not warranted.

1. "The federal habeas statute gives the United States district courts jurisdiction to entertain petitions for habeas relief only from persons who are '*in custody*[.]'" *Maleng* v. *Cook*, 490 U.S. 488, 490 (1989); see *Carafas* v. *LaVallee*, 391 U.S. 234, 238 (1968). The Court has construed the "in custody" requirement broadly, to authorize jurisdiction over a habeas corpus petition even when the petitioner is not physically confined. See *Maleng*, 490 U.S. at 491. Nonetheless, the Court has always insisted that a habeas petitioner must be under some current, actual restraint on his liberty to be "in custody" within the meaning of the habeas corpus statute. See *id.* at 492. It is not sufficient, to establish habeas corpus jurisdiction, that the petitioner may suffer adverse collateral consequences flowing from the order under challenge (*ibid.*); rather, the petitioner must show that his freedom is actually constrained in a way "not shared by the public generally." *Jones* v. *Cunningham*, 371 U.S. 236, 240 (1963).

Petitioner cannot make that showing in this case. Petitioner has not asserted that he is under any current, actual restraint in Mexico that is attributable to United States authorities.[4] From aught that appears in the record, petitioner is free to move about in Mexico as he pleases. No authority of the United States

---

[4] Even if petitioner could make such a showing, it is doubtful that the writ of habeas corpus could issue in such a circumstance. See *Johnson* v. *Eisentrager*, 339 U.S. 763, 771 (1950) (holding that an alien detained abroad by U.S. military authorities was not entitled to habeas corpus, and noting that, "in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act").

government constrains him from doing so. It is true that, under the INA, because petitioner has been removed based on his aggravated felony conviction, he is permanently barred from readmission into the United States. See 8 U.S.C. 1182(a)(9)(A)(ii) (Supp. V 1999). That bar on admission into the United States (in the event that petitioner were to apply for admission), however, does not amount to a current restraint on his liberty. It is, at most, a collateral consequence of the removal order against him insufficient to satisfy the custody requirement of habeas corpus jurisdiction. Moreover, the admission of any alien into the United States is subject to extensive regulations and restrictions in the INA; the fact that petitioner does not have an unfettered right to be admitted into the United States does not distinguish his situation from that of the vast majority of noncitizens. And this Court has never suggested that an alien abroad may challenge a prohibition on his entry into the United States by habeas corpus. Cf. *Brownell* v. *Tom We Shung*, 352 U.S. 180, 184 n.3 (1956) (alien abroad may not challenge restriction on entry by declaratory judgment).

Petitioner contends (Pet. 7-10) that the decision below is contrary to the presumption that the federal courts are available to hear constitutional challenges to governmental action, and that he is without a remedy to challenge the constitutionality of Congress's expansion of the definition of "aggravated felony" in 1996. Petitioner had an avenue in federal court, however, to raise that claim. Petitioner could have appealed the IJ's removal order to the BIA and then (assuming the BIA would have rejected his challenge) could have filed either a petition for review in the court of appeals or a habeas corpus petition in district court challenging his final removal order on constitutional grounds.

Petitioner also could have requested a stay of deportation from the court. Under this Court's decision in *INS* v. *St. Cyr*, 121 S. Ct. 2271 (2001), the district court would have had authority under the habeas corpus statute to entertain petitioner's constitutional challenge —at least if, contrary to our position (see note 5, *infra*), the court of appeals concluded that it did not have jurisdiction over petitioner's constitutional challenge. See *id.* at 2282-2283 (reviewing federal courts' authority to answer "questions of law in habeas corpus proceedings brought by aliens").[5]

---

[5] This Court's recent decisions in *St. Cyr* and *Calcano-Martinez* v. *INS*, 121 S. Ct. 2268 (2001), do not appear to foreclose the possibility that petitioner could have raised his constitutional challenge to his removal order on direct petition for review in the court of appeals, pursuant to the judicial-review provision of 8 U.S.C. 1252(a) (Supp. V 1999). Section 1252(a)(2)(C) of Title 8 precludes the courts of appeals from reviewing a removal order entered against an alien based on a conviction for an aggravated felony. See 8 U.S.C. 1252(a)(2)(C) (Supp. V 1999); *Calcano-Martinez*, 121 S. Ct. at 2270. As this Court noted in *Calcano*, however, the scope of that preclusion of review "is not without its ambiguities." *Id.* at 2270 n.2. In particular, the government has taken the position that Section 1252(a)(2)(C) does not bar judicial review of substantial constitutional challenges to provisions of the INA. *Ibid.* Section 1252(a)(2)(C) also does not preclude an alien from contesting, on petition for review, that the offense that formed the basis of his removal order was not in fact an aggravated felony. *Ibid.* Petitioner in this case contends that Congress's retroactive expansion of the definition of "aggravated felony" in IIRIRA was unconstitutional as applied to his case. If that challenge is understood as an assertion that petitioner's conviction was not validly classified as an aggravated felony, then the court of appeals would have had jurisdiction to entertain it, had petitioner filed a timely petition for review (which he did not). See 8 U.S.C. 1252(b)(1) (Supp. V 1999) (30-day deadline for petitions for review).

Petitioner's failure to pursue one of those avenues of judicial redress in the appropriate and timely fashion does not provide a reason to avoid application of the "in custody" requirement of the habeas statute in this case. We note as well that under, 8 U.S.C. 1252(d)(1) (Supp. V 1999), petitioner's failure to exhaust his administrative remedies, by seeking review by the BIA of the IJ's removal order, constitutes an independent bar to judicial review on this case.

2. The district court would not have had authority to disregard the "in custody" requirement of the habeas corpus statute by exercising jurisdiction over petitioner's challenge to his removal order under 28 U.S.C. 1331. This Court has made clear that, where the habeas corpus statute, with its carefully designed prerequisites for and restrictions on relief, might apply to provide a detained person with a remedy, that statute "must be understood to be the exclusive remedy available." *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973). Otherwise, it would "wholly frustrate explicit congressional intent" to limit habeas corpus relief to certain defined circumstances if the petitioner could simply apply a different label to his claim for relief or invoke a differ-

---

In addition, had petitioner filed a timely petition for review, the fact that he was removed from the United States would not have precluded the court of appeals from ruling on the petition. The judicial-review provision of Section 1252(a) does not contain a jurisdictional "in custody" requirement similar to that of the habeas corpus statute. In removal cases under IIRIRA, the courts of appeals may entertain petitions for review filed by aliens who have been removed. The provision under pre-IIRIRA law precluding judicial review of deportation orders entered against aliens who have been deported, 8 U.S.C. 1105a(c) (1994), was repealed by Section 306(b) of IIRIRA, see 110 Stat. 3009-612, and was not replaced by any similar provision.

ent statutory section number for the district court's jurisdiction. See *id.* at 489-490. Here, Congress has carefully limited the availability of the writ of habeas corpus to circumstances where the detained person is in custody—in conformity with the terms of the Great Writ. See *Carafas*, 391 U.S. at 238. The district court does not have authority to disregard that explicit congressional restriction on habeas corpus relief by exercising its general federal question jurisdiction.

Moreover, the INA itself contains its own prelusions of review that would bar an action for judicial review of a final removal order in district court based on general federal question jurisdiction. See 8 U.S.C. 1252(a)(1) and 1252(b)(1) (Supp. V 1999). Although the Court held in *St. Cyr* that those prelusions of review did not bar the exercise of habeas corpus jurisdiction to consider a pure question of law where review could not be had in the court of appeals, the Court did not suggest that those preclusion provisions would be ineffective to bar the exercise of federal question jurisdiction. See 121 S. Ct. at 2285-2287.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
ROBERT D. MCCALLUM, JR.
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

OCTOBER 2001